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Executives Fined Personally for Leading a Cartel in the Netherlands

On 4 November 2010 the Dutch Competition Authority (known by its Dutch acronym "NMa") sent a strong signal to any high-ranking company officials who knowingly and actively engage in cartel activity, by imposing personal fines on three executives in the construction sector for the role they played in orchestrating a cartel.

The NMa held the executives personally liable for deliberately coordinating bids on construction contracts by means of "cover pricing". The fines imposed ranged from EUR 10,000 to 250,000, taking into account the personal financial situation of the executives concerned. This follows another recent case in which personal fines of up to EUR 350,000 were imposed on company management.

The Dutch Competition Act enables the NMa to impose personal fines of up to EUR 450,000 on directors of legal entities for breach of cartel rules, and the NMa seems to be employing this deterrence tool as an alternative to the ever-increasing fines at corporate level.

In addition to imposing personal fines for cartel activity, the NMa can also fine individuals who refuse to cooperate with the NMA during the course of an investigation. It has already imposed a fine of EUR 100,000 on an individual who held several management positions within a company investigated for refusing to cooperate with the case handlers, and it should be noted that the individual had long retired from the company in question. The NMa wanted to give a strong signal that no one is shielded from the obligation to cooperate in an investigation, regardless of their present connections with the company.

Interestingly, the NMa has also introduced the possibility for an individuals to apply for leniency and be granted full immunity from personal fines by blowing the whistle on suspected cartel activity within their company. Even if the company applies for leniency, the whistleblower could still benefit from individual leniency if he can provide added value to the investigation. This, of course, implies an admission of personal and active involvement in the cartel, or that he had given instructions to staff under his orders to participate.

Similar penalties already exist in a number of other EU Member States, where, for example in the United Kingdom, criminal sanctions may also be imposed. The case against the British Airways executives in the United Kingdom, however, which collapsed earlier this year due to lack of evidence, indicates an extensive burden of proof and respect for rights of defence that must be satisfied. This makes enforcement more onerous and puts a strain on resources.

Accordingly, the NMA's approach of using administrative fines against company directors might be perceived by competition authorities across the European Union as an increasingly important method to deter illegal cartels.

Personal fines could also provide a valuable addition to the European Commission's deterrence strategy, which until now has only led to massive fines at corporate level. As yet, however, this instrument is not available to the European Union.

Asta Aleskute also co-authored this article.

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